Trustee duties: Investment duties

Step one: Investment made?

Step one: Investment types

Investment meaning:

- **Profit/return:** The core meaning of investment is exchange or purchase from which profit or return is expected. **– *Perpetual Trustee v Cheyne*.**
- **Shares:** Investment includes the purchase of shares or letting land for rent. **– *Byrnes v Kendle*.**
- **Rent:** Investment includes letting land for rent. **– *Byrnes v Kendle*.**
- **Exchange:** The disposition of money must allow for something in exchange. **– *Perpetual Trustee Company v Cheyne*.**

Step two: Duty to act with reasonable prudence

Step one: Prudence standard (statutory)

Standard of produce – Section 6(1) *Trustee Act*

(a) **Professional:** If a professional trustee invests on behalf of others, the standard is that which a prudent person engaged in that profession would exercise in managing affairs of other people.
   - **Aware of trends:** Professional trustees are expected to be aware of current investment trends that offer high returns or are safe, even during financial crisis. **– *HLB v Trust Company*.**

(b) **Non-professional:** The standard is that which a prudent person would exercise in managing the affairs of other people.

Step two: Prudence standard (equity)

Prudence standard (test): The duty of the trustee is to conduct the business of the trust with the same care that an ordinary prudent man of business would extend towards their own affairs. **– *Speight v Gaunt*.**

- **Professional trustee/finance corporation:** A higher standard of care is expected of a trust corporation that holds itself out as having specialised and trained staff able to give advice and having access to financial information. **– *ASX v AS Nomineee; Bartlett v Barclays Bank*.**
- **Economic conditions/understandings:** The test must be adopted to current economic conditions and temporary understanding of markets and conditions, which the trustees can judge. **– *Nestle v National Westminster Bank*.**

Step three: Duty to invest trust funds

Step one: Duty to invest + act in the beneficiaries' best interests

Duty to invest: A trustee may, unless expressly prohibited by the instrument creating the trust: **– Section 5 *Trustees Act*:**

- **Invest:** Invest trust funds in any form of investment; and
- **Vary:** By any time, vary an investment.

Best interests: The trustee has a duty to act in the best interests of beneficiaries (present and future). **– Section 7(2)(a) *Trustee Act*.**

Step two: Trust provision requirement to invest?

Provision requirement: A trustee must exercise investment power according to any provision of the trust instrument. **– Section 6(2) *Trustee Act*.**

Step three: Investment considerations

Trustee considerations when investing – Section 8(1) *Trustee Act*

(a) **Purpose:** The purposes of the trust and needs and circumstances of the beneficiaries; and
(b) **Diversification:** The disability of diversifying trust investments; and
   - **Low risk only:** Investing trust assets only in low risk return investments (low risk management fund), fails diversification requirements. **– *HLB v Trust Company*.**
   - **Diversification in financial crises:** The trustee is still in breach if they fail to consider other investments during financial crises. **– *HLB v Trust Company*.**
   - **No loss:** The failure to diversify is a breach of produce, even if there is not a loss. **– *HLB v Trust Company*.**

(c) **Risk:** The risk associated with existing trust instruments and trust property; and
(d) **Real value:** The need to maintain the real value of the capital or income of the trust; and
(e) **Loss/depreciation:** The risk of capital or income loss or depreciation; and
(f) **Appreciation:** The potential for capital appreciation; and

(g) **Income returns:** The likely income return and timing of income return; and
(h) **Time:** The length of the term of the proposed investment; and
(i) **Trust duration:** The probable duration of the trust; and
(j) **Liquidity/marketability:** The liquidity and marketability of the proposed investment during, and on the determination of, the term of the proposed investment; and
(k) **Value:** The aggregate value of the trust estate; and
(l) **Tax:** The effect of the proposed investment in relation to the tax liability of the trust; and
(m) **Inflation:** The likelihood of inflation affecting the value of the proposed investment or other trust property; and
(n) **Costs:** The costs (including commissions, fees, charges and duties payable) of making the proposed investment; and
(o) **Existing trust instruments:** The results of a review of existing trust investments.

<u>Step four: Performance review</u>

Performance review: Subject to the instrument creating the trust, a trustee must, at least once in each year, review the performance (individually and as a whole) of trust investments. **– Section 6(3) *Trustee Act*.**

- **Consideration of other investments:** The trustee is in breach if they fail to review the trust's performance to allow for consideration of other capital guarantee investments. ***– HLB v Trust Company*.**

Results: The trustee must have regard to the results of a review of existing trust investments. **– Section 8(o) *Trustee Act*.**

<u>Step five: Speculation</u>

Not speculative: Trustees have a duty to invest trust funds in investments that are not speculative. **– Section 7(2)(b) *Trustee Act*.**

- **Exception:** Section 7 requirements can be excluded by trust deed.

<u>Step six: Duty to take advice</u>

Advice: The trustee has an equitable duty to take advice on matters outside their expertise, including investments. **– Section 7(2)(d) *Trustee Act*.**

- **Advice costs:** The cost of taking investment advice is payable out of the trust funds. **– Section 7(4) *Trustee Act*.**

Competent adviser: The trustee may take and consider advise for the investment of trust funds, or management of investment from person the trustee believes is competent to give advice. **– Section 8(2)(a) *Trustee Act*.**
Advice costs: The cost of taking investment advice is payable out of the trust funds. **– Section 8(2)(b) *Trustee Act*.**

Step three: Trustee duty: Duty to act impartially (fairly)

<u>Step one: No Discretionary power</u>

No Discretionary power: The duty to act impartially does not apply to discretionary power held by the beneficiary.

<u>Step one: Impartiality</u>

Impartiality: A trustee has a duty to act impartially towards beneficiaries and between different classes of beneficiaries. **– Section 7(2)(c) *Trustees Act*.**

- **Impartially** = Independent, fairly and without bias towards all beneficiary classes.
- **Fairly:** The trustee must act fairly in making their investment decisions which may have different consequences for different beneficiary classes. ***– Nestle*.**
- **Wide discretion:** The trustee has wide discretion when appointing trust funds, and can consider competing considerations from different classes. ***– Nestle*.**
- **Relationships:** Trustees can consider the relationships between classes of beneficiaries. ***– Nestle*.**

<u>Step two: test</u>

Impartiality test: The trustee must have regard to the interests of the estate (trust) as a whole. ***– Re VBN v APRA*.**

Examples:

- **Favouring a life tenant:** An Investment favouring a life tenant over capital beneficiaries was not impartial. **– *Re Mulligan*.**

Elderly widow: Trustees were entitled to favour an elderly widow. **– *Nestle*.**

Step four: Court considerations (defences)

Step one: Court considerations

Considerations for breach of trust – Section 12C *Trustees Act*

In proceedings against a trustee for breach of trust, the Court may consider:

(a) The nature and purpose of the trust; and

(b) **Section 8 considerations:** If the trustee implemented/considered section 8 considerations so far as is appropriate to the circumstances of the trust; and

(c) **Investment strategy:** Whether the trust investments have been made pursuant to an investment strategy formulated in accordance with the duty of a trustee under this Part; and

(d) **Professional advice:** The extent the trustee acted on the independent and impartial advice of a person competent (or apparently competent) to give the advice.

Step two: Set offs

Setting off gains and losses arising: The Court may, when considering an action for breach of trust from an investment by a trustee where there is a loss, set off all the loss resulting from that investment against all or part of the gain resulting from any other investment whether in breach of trust or not. **– Section 12D(1) *Trustees Act*.**

- **Case facts:** Setting off a risky property investment (that failed) against a safer property investment (that was successful). **– *Bartlett*.**

Step three: Honestly and reasonably

Honestly a reasonably: If the trustee acted honestly and reasonably and ought fairly to be excused for breach of trust, and for omitting to obtain directions of the court in the manner, the court may relieve them wholly or partly for liability. **– Section 67 *Trustee Act***.